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IN THE

Supreme Court of the United States

October Term, 1951

No. 542

THE CREAMETTE COMPANY,
Petitioner,

vs.

T. A. CONLIN, et al.,
Respondent.

PETITIONER'S REPLY BRIEF

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REPLY

GENERAL STATEMENT

Because the United States Patent Office has issued a decision on petitioner's registered trade marks that are before the Court in this case since the petition for writ of certiorari was filed, and because respondent's brief opposing the petition effectively challenges the applicability of the Trade Mark Act of July 5, 1946, known as the Lanham Act, to *instrastate* commerce when the same interferes with *interstate* commerce, it is believed fitting and appropriate for petitioner to file a brief reply.

RECENT PATENT OFFICE DECISION

On February 6, 1952, the examiner of Trade Mark Interferences (United States Patent Office) issued a decision relating to petitioner's trade mark CREAM-

ETTES and CREAMETTE in the case of *The Creamette Company v. Red Dot Foods, Inc.*, Opposition 29,101 (not yet published). In this case an application to register by Red Dot Foods, Inc., the trade mark "KORN-ETTES" for "corn chips, a food product made from corn mash which is baked or fried," was opposed by The Creamette Company, Petitioners here and denied registration under the Act of 1946 because of the prior use of the trade mark CREAMETTES and CREAMETTE (Petitioner's trade marks at issue in this case) applied to a variety of food products including macaroni, vermicelli, spaghetti, noodles, breakfast foods, unpopped popcorn, and potato chips, on the grounds that CREAMETTES and CREAMETTE were deemed to be arbitrary and that "Cream," which in sound and composition is not entirely unlike the word "KORN" occupying a similar position in the applicant's mark, and would be likely to cause confusion or mistake or deception of purchasers when applied contemporaneously to the goods involved.

To support his decision the Examiner cited a decision of the Commissioner of Patents, *Kraft Cheese Company of Wisconsin v. The Fisher Dairy and Cheese Co.*, 70 U. S. P. Q. 544, 591 O. G. 666, where the notation "Eatette" as a trade mark for processed cheese, was held to be confusingly similar to Kraft's trade mark "Pabst-ett" and "Munst-ett." The pertinent part of the Commissioner's decision which is highly in point is:

> "After noting that the examiner, citing dictionary definitions of the suffix '-ette,' concluded therefore that no one may preempt the field with respect to marks incorporating such a commonly used suffix, it was held that as applied to cheese, *'ett' and 'ette' are purely arbitrary terms, which are subject to exclusive appropriation;* and in applicant's mark there is nothing else that is capable of trade-mark

significance, for certainly the word 'eat' could not serve to denote the origin of a food product; so that applicant has thus appropriated a prominent portion of opposer's marks as the dominant part of its own, and by setting it off with a hyphen has enhanced the resulting similarity." (Italics supplied.)

THE TRADE MARK ACT OF JULY 5, 1946

The manner in which respondent has directed the "Questions Presented" challenges the effectiveness of the federal regulations of unfair competition within the state of Florida.

The petitioner is the owner of a number of federal trade mark registrations, all of which have been brought within the jurisdiction of the Trade Mark Act of July 5, 1946, and therefore it is contended that since petitioner does business in interstate commerce that the interpretation of the extent of protection granted by those registrations should be governed by the federal interpretation of "unfair competition" both as the same is regulated by quasi judicial bodies such as the tribunals of the United States Patent Office, and by the Federal courts.

This contention is adequately supported in recent decisions of the Supreme Court. In *Wickard v. Filburn,* 317 U. S. 111, 63 S. Ct. 82, Mr. Justice Jackson quoted from the opinion of Mr. Chief Justice Stone in *United States v. Wrightwood Dairy Co.,* 315 U. S. 110, 62 S. Ct. 523, as follows:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. * * * The power of Congress over interstate commerce is

> plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. *Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.*" (Italics supplied.)

In *United States v. Wrightwood Dairy Co.*, Mr. Justice Stone quotes a number of examples of where the Congressional power to regulate interstate commerce has been applied to intrastate activities, such as the power to regulate safety appliances on railway cars, intrastate rates of a common carrier, inspection of tobacco produced intrastate and destined to consumers within the state as well as without, as well as practices which are wholly intrastate but which may be reached by the Sherman Act.

Thus it is evident that this case is not primarily concerned with the rights of two parties, but touches upon substantially every registered trade mark in the United States, and particularly those which have developed into fame through great expense and enormous effort of their owners, and that might be pirated by intrastate users.

The new trade mark Act had among other purposes, the necessity of consolidating into one body of law a uniform interpretation of the extent of trade mark protection throughout the nation and to prevent the establishment of 48 different interpretations of what constitutes "unfair competition." A full discussion of this theory is set forth in *Bulova Watch Co., Inc. v. Stolzberg*, 69 F. Supp. 543, a case relatively similar to the one at bar, where the use of the trade mark "Bulova" by a

small merchant on shoes was enjoined because of the plaintiff's prior use for nearly fifty years of "Bulova" on watches. Most important, however, was the fact that the Court ruled that *federal interpretation of unfair competition would apply despite the intrastate nature of defendant's business.* (Italics supplied.)

CONCLUSION

Because the United States Patent Office, through its experts who are daily interpreting the federal effect of the Act of July 5, 1946, has given an interpretation to petitioner's trade marks which is correct and is clearly conflicting with what is believed to be an incorrect interpretation by the Fifth Circuit Court of Appeals, and because the power of Congress to legislate uniform laws relating to unfair competition is seriously challenged, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

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